

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

DARLENE MANLEY
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-133
Case No. 71-7904

S.S.A. No.

ROBERT W. MOONEY, dba
THE HIDEAWAY
(Employer)

Employer Account No.

DEPARTMENT OF HUMAN
RESOURCES DEVELOPMENT

The Department appealed from Referee's Decision No. ONT-FED-9309 which set aside Department determinations that the claimant was disqualified for unemployment insurance benefits under sections 1256 and 1257(a) of the California Unemployment Insurance Code, and a resulting overpayment of benefits. A Department ruling had also relieved the employer's account of benefit charges. The referee referred the case to the Department for investigation of a possible disqualification under section 1257(b) of the Code. Written argument was submitted by the Department but not the claimant or the employer.

STATEMENT OF FACTS

The claimant worked as a barmaid for approximately two years for an establishment called The Hideaway. Her employment terminated October 20, 1970 under circumstances described below. She filed a claim for benefits effective October 25, 1970 and established an award with

a weekly benefit amount of \$39. Thereafter she claimed and received weekly benefits for 26 consecutive weeks beginning November 1, 1970. Benefits paid totaled \$1,014.

When she filed her claim, the claimant reported that she was unemployed because of a layoff due to lack of work. On her initial claim statement she said that she was laid off because the owner had sold the business. The employer did not respond to the notice of the filing of the claim and benefits were paid without question. The notice was addressed to the former owner.

Subsequently the claimant filed a claim for federal extended duration benefits effective May 2, 1971. The new owner of the business promptly protested the payment of benefits, informing the Department that the claimant had first accepted and then rejected an opportunity to continue in her job after the transfer of ownership. Further contact with the employer but not with the claimant led to a determination by the Department that the claimant had wilfully withheld information regarding the offer of continued employment. The forms which the claimant completed in connection with her termination did not include any questions designed to elicit information concerning the job offer at the time the business changed hands.

The former owner had told the claimant that when the new owner came into possession of the business her job would end. The new owner took over in mid-morning on the claimant's last day of work, after he had received the transferred liquor license for which he had been waiting. The claimant stopped working but stayed on the premises for several hours during which she received a final paycheck from the prior owner.

The transfer of ownership had been virtually completed several weeks earlier except for the necessary liquor license. About a week prior to the claimant's last day of work the new owner and a prospective female employee asked the claimant if she would continue working after the change. The claimant wanted to talk it over with her husband. A couple of days

later, before the liquor license arrived, the claimant told the purchaser that she did not want to keep her job. The new owner asserts that he had showed the claimant a proposed new schedule which would have provided her with 36 hours of work a week. She had previously worked a 40-hour week. The record is not clear as to whether the claimant was actually hired prior to the completed transfer or only offered a job. In her appeal to a referee the claimant stated she had not been hired. She admits the offer of continued employment but denies any discussion of a work schedule. She testified that she expected such a discussion but heard only a rumor that her hours would be changed. When she declined to continue the job she gave no reason. Apparently it was because of the employer's alleged failure to discuss a work schedule with her, and the indicated reduction in her hours. She did not make any inquiries but simply waited for the new owner to come to her; when nothing happened she decided not to stay on the job.

REASONS FOR DECISION

Section 1256 of the code provides for the disqualification of a claimant and sections 1030 and 1032 of the code provide that the employer's reserve account may be relieved of benefit charges if it is found that the claimant voluntarily left his most recent work without good cause.

Section 1257(b) of the code provides that an individual is disqualified for benefits if he, without good cause, refused to accept suitable employment when offered to him.

The issue is which of these two sections applies when there has been a change in proprietorship of the employer and an employee may, but chooses not to, continue in his job.

The Department determination was based on section 1256. The referee's decision treated the case as one involving section 1257(b). He relied primarily on Appeals Board Decision No. P-B-44, where we found that

the proposed transfer of a claimant from one company to an affiliated but separate company did not reflect a continuing employment relationship but was in fact the termination of one relationship and the beginning of another. In other words, it was a transfer to new work for a new employer. On that basis we found that the refusal of the claimant to accept the transfer was not a refusal to accept other work of the same employer and therefore did not negate the good cause she had for quitting.

We do not think that decision is applicable here. The new owner assured the claimant of continued employment after the change became effective. She would have remained at the same location doing exactly the same work under almost identical circumstances.

In Appeals Board Decision No. P-B-37 we held that if a claimant leaves employment while continuing work is available, the claimant is the moving party in the termination. In Appeals Board Decision No. P-B-27 we reaffirmed a well established principle of unemployment insurance that good cause for the voluntary leaving of work exists only when the facts disclose a real, substantial and compelling reason of such nature as would cause a reasonable person genuinely desirous of retaining employment to take similar action.

There are many occasions involving a change of ownership where a work force is taken over en masse. We do not believe that in such cases an advance offer to be retained on the job can be construed as an offer of new work where the employee simply goes on with his job as before. It is our opinion that an employee given such an opportunity and refusing it voluntarily quits his job, and the only issue remaining would be whether he quit for good cause.

We believe that similar reasoning can be applied here. Nominally, the employer changed but actually the continuity of the operation remained unbroken. The job itself was essentially unchanged. The location was unchanged. Continued employment was offered in advance of the changeover. The attachment between

the claimant and the job continued, regardless of the change in ownership. The claimant voluntarily terminated her employment while continuing work was available. This falls within our holding in Appeals Board Decision No. P-B-37.

The employer and the claimant disagreed on whether the new work schedule had been discussed, but if the claimant was uncertain about the matter, her most reasonable course of action would have been to ask the employer for information rather than quit. A slight reduction in hours would not of itself be good cause for quitting, nor would the failure of the employer to discuss a work schedule with the claimant. Since the claimant had no valid compelling reason for refusing to continue in her job, she quit without good cause and was properly disqualified under section 1256 of the code.

The instant case involved the transfer of the business from one sole proprietor to another. We do not believe the result would be different if the change in ownership involved a partnership or corporation or any other form of business association on either or both sides. The principle would be the same: An offer of continued employment on substantially the same basis as before, made in advance of a change in proprietorship, is not an offer of new work, and refusal of the offer is not a refusal of new work but a voluntary leaving of employment.

Since section 1257(b) does not apply, it is not necessary to decide whether the work was suitable or whether the claimant had good cause for refusing it. The remand to the Department for further inquiry and action on that ground must be set aside.

Section 1257(a) of the code provides that a claimant is disqualified for benefits if he wilfully made a false statement or representation or wilfully failed to report a material fact to obtain unemployment compensation benefits.

The referee decided that when the claimant reported that she was laid off for lack of work, she did not make a false statement since this is what the prior owner had told her. The referee also held that the parties had not been put on notice that the issue of wilfully failing to report a material fact, i.e., the offer of continued employment, would be considered at the hearing and therefore it must be referred to the Department for appropriate action.

The notice of hearing included section 1257(a) (whether the claimant wilfully made a false statement or wilfully failed to report a material fact to obtain benefits) as one of the issues. The introductory remarks by the referee at the hearing also listed this as an issue, and included a statement that the issues had been discussed with the parties prior to the hearing. We do not think there was a lack of notice to the parties concerning the issues involved. The referral to the Department on this issue must also be set aside, as well as the referral on the overpayment issue.

In our view the record as it stands will sustain a finding that the claimant should be disqualified under section 1257(a). When the claimant stated originally that she was laid off for lack of work because the owner had sold the business, she did not reveal that for her there was no lack of work and that she could have continued in her job.

Section 100 of the code, which states the legislative policy behind the law, includes a statement that the purpose of the legislation is to provide unemployment compensation benefits for persons unemployed through no fault of their own. The Department is the administering agency for unemployment insurance and must be provided with all available information in order to make a fair determination of eligibility for benefits. If a claimant withholds a key fact, whether specifically asked for or not, which the claimant knows, or should know, has a bearing on the determination, the intent of the law is thwarted. The claimant was told by the prior owner of the establishment that she would be laid off when it changed hands. However, before the layoff actually took place, she was asked to continue

working. Thus, there was no lack of work and no necessary layoff resulting from the sale of business. The claimant knew these facts and should have known they would materially affect her right to benefits. Nevertheless she did not report them to the Department. This was a wilful act which resulted in the payment of benefits to which she would otherwise not have been entitled.

Section 1375 of the code provides that any person who is overpaid benefits is liable therefor unless the overpayment was not due to fraud, misrepresentation or wilful nondisclosure on the part of the claimant, was received without fault and recovery would be against equity and good conscience.

The claimant's failure to fully inform the Department of the true facts of her case was wilful. Since an overpayment resulted, she is liable for its repayment in full.

DECISION

The decision of the referee is reversed. The claimant is disqualified under sections 1256 and 1257(a) of the code as determined by the Department. She is liable for the full overpayment of \$1,014. The referral to the Department for further inquiry and action is set aside. The employer's account is relieved of charges.

Sacramento, California, March 7, 1972.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT W. SIGG, Chairman

CLAUDE MINARD

JOHN B. WEISS

CARL A. BRITSCHGI

DISSENTING - Written Opinion Attached

DON BLEWETT

DISSENTING OPINION

I cannot concur in any aspect of the decision adopted by the majority members of this board.

The issue for decision presently before this board is whether this claimant left work voluntarily or refused an offer of new employment. It may be conceded that continuing employment would have been available to the claimant. The question, however, is the continuity of the employment relationship.

The claimant had worked as a barmaid for a sole proprietor for an extended period of time. It was ultimately decided by the owner that he would withdraw from the operation of the business. Negotiations for the sale of the establishment were undertaken resulting in a purchase subject to approval and transfer of existing licenses by the licensing authority under which such business would be conducted. Once the sale was deemed complete, the owner of the business informed his employees, the claimant among them, that they would no longer be employed as of the effective date of the transfer, which in the instant case was October 20, 1971.

Prior to the issuance of the new license in the name of the new purchaser, the possibility of continuing employment was extended to the claimant by the purchaser of the business, which, although possibly guaranteeing continuing employment, would nevertheless have resulted in altered terms and conditions of employment. The terms of the sale were silent with respect to the rights of the then employees and the offer of employment was extended solely with the view towards maintaining an adequate staff for the proper conduct of business. The claimant declined the offer extended by the purchaser and thereafter established a claim for benefits.

Benefit Decision No. 6088 has been followed for many years. In that case Corporation "B" was a wholly owned subsidiary of Corporation "A". There was a common

management, board of directors, personnel policy and administration. In administering such companies, however, separate payroll accounts were maintained as to each company, although the payroll itself was handled through a single location.

The claimant therein initially began work with Corporation "A". Due to a reduction in the production requirements of "A", the claimant was informed of her layoff and offered a position with "B", an offer which was accepted by the claimant. After a period of time "B" was involved in a reduction in personnel and the claimant was again informed her position was to be eliminated. She was however offered reemployment with "A", an offer which was rejected by the claimant for reasons not material herein. There, as here, it was urged that since continuing employment was available to the claimant and refused, the claimant must be considered to have left work voluntarily without good cause.

This contention was rejected by the board when it pointed out that the identity of the two employers was separate and distinct, notwithstanding the interlocking directorate and corporate officers. Each corporation had its own separate account and the employment of the claimant with each corporation represented a new period of employment which terminated by layoff. With respect to the final incident, while the claimant may have enjoyed continued employment, her unemployment was due to her refusal of suitable work, not by her voluntary separation from employment. We have a stronger case here because we are not involved with a corporate structure but rather an individual ownership. There is no continuity of identity between the former owner and the new owner.

No question would have been posed had the claimant left work with her former employer due to the closing of the business and upon leaving the premises been offered identical employment by a competitor located directly next door or across the street from the original employer; not even where such competitor opened his business as a result of the sale or had even participated in the purchase and sale of the original employer.

Section 2920 of the Labor Code provides:

"2920. Every employment is terminated by any of the following:

- (a) Expiration of its appointed term.
- (b) Extinction of its subject.
- (c) Death of the employee.
- (d) The employee's legal incapacity to act as such."

The First District Court of Appeal in Gaspar v. United Milk Producers of California (1944), 144 P. 2d 867, 62 C. A. 2d 546, at 553, said:

"No California case which we have found announces a rule contrary to the rule generally recognized that where an employer puts out of his power the further performance of an employment contract by selling his entire business it operates as a discharge of his employee engaged in such business."

Thus the law is clear that where, as here, an employer sells its business we have a termination of employment and an offer of work to the seller's employees by the buyer constitutes an offer of new employment.

Further, as I pointed out in my dissent in Appeals Board Decision No. P-B-116 my view is fortified by the U. S. Department of Labor, Unemployment Insurance Program Letter No. 984, dated September 20, 1968. That letter provides in part:

"Interpretation of 'New Work'

"For the purpose of applying the prevailing conditions-of-work standard in section 3304(a)(5)(B) of the Federal Unemployment Tax Act, an offer of new work includes (1) an offer of work to an unemployed individual by an employer with whom he has never had a contract of employment; (2) an offer of re-employment to an unemployed individual by his last (or any other) employer with whom he does not have

a contract of employment at the time the offer is made; and (3) an offer by an individual's present employer of (a) different duties from those he has agreed to perform in his existing contract of employment, or (b) different terms or conditions of employment from those in his existing contract.

"This definition makes the determination of whether an offer is of 'new work' depend on whether the offer is of a new contract of employment. This we believe is sound.

"All work is performed under a contract of employment between a worker and his employer. The contract describes the duties the parties have agreed the worker is to perform, and the terms and conditions under which the worker is to perform them. If the duties, terms, or conditions of the work offered by an employer are covered by an existing contract between him and the worker, the offer is not of new work. On the other hand, if the duties, terms, or conditions of the work offered by an employer are not covered by an existing contract between him and the worker, the offer is of a new contract of employment and is, therefore, new work.

"It is not difficult to agree that 'new work' clearly includes an offer of work to an unemployed individual by an employer with whom he has never had a contract of employment; that is, an employer for whom he has never worked before. If the worker has never had a contract of employment with the offering employer, the fact-finding and the application of the test are simple."

I similarly disapprove the conclusion that in establishing her claim for benefits this claimant wilfully misrepresented or wilfully withheld any material fact.

In initially applying for benefits, the claimant set forth as the reason for separation the fact that

she had been laid off. In response to further questioning by the Department, it was elicited that the business had been sold and that the claimant had been informed of her layoff. Thus, the basic circumstances under which the claimant left work were fully and completely set forth. To require this claimant to give additional unsolicited information attributed to this claimant a sophistication and a technical knowledge as to the law, which obviously is not shared even by professionals in the field of unemployment insurance.

From my review of the record I cannot find in good conscience this claimant wilfully concealed or misrepresented any material fact within the purpose and purview of section 1257(a) of the code and would affirm the decision of the referee with respect to such issue.

DON BLEWETT